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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

—  
No. 75-804  
—

RICHARD T. HILL, *Petitioner*,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25, ET AL., *Respondents*.

—  
On Writ of Certiorari to the Court of Appeal of the  
State of California, Second Appellate District  
—

**MOTION TO VACATE AND REMAND  
AND  
MEMORANDUM IN SUPPORT THEREOF**

—

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**MOTION TO VACATE AND REMAND**

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Respondents move that the judgment of the Second Appellate District of the Court of Appeal of California be vacated and the cause be remanded to that Court for a determination of whether the present action, brought by petitioner, survives his death which took place on January 28, 1976. The grounds for this motion are stated in a memorandum filed herewith.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE AND REMAND**

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On January 26, 1976, this Court granted certiorari to review a judgment of the District Court of Appeal for the State of California. That Court had reversed a judgment entered on behalf of petitioner, the plaintiff in this action, on a jury verdict for \$7500 actual damages and \$175,000 punitive damages for the tort of intentional infliction of emotional distress. The basis

for reversal was that the state courts were without power to award damages for petitioner's claim under the doctrine of *San Diego v. Garmon*, 359 U.S. 236; the appellate court did not pass upon the state law grounds which the defendants had also asserted for setting aside the judgment. The petition for certiorari raises the question whether the District Court of Appeal erred in its application of *Garmon*.

On January 28, 1976, petitioner died.\* The question necessarily arises, therefore, whether Mr. Hill's cause of action survives him, for a decision of the federal, and, in the final analysis constitutional (see *e.g.*, *Perez v. Campbell*, 402 U.S. 637, 644-652), question presented by the petition

"would be inconsistent with our constitutional inability to render advisory opinions, and with our consequent policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision. See *Murdock v. Memphis*, 20 Wall. 590, 634-636." *Bell v. Maryland*, 378 U.S. 226, 237.

Whether the present tort action survives is, of course, a question of state law, which only the California courts can answer authoritatively. Accordingly,

"to let issues of state law be decided by state courts and to preserve our policy of avoiding gra-

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\* At the present writing no administrator has been appointed for petitioner's estate. *Strictissimi juris* therefore, there is no petitioner before this Court. However, Mr. Hill's counsel of record has expressed his intention of filing a brief and appendix without awaiting the appointment of an administrator. Accordingly, the present motion is filed at this time, in order to obviate unnecessary expenses to both sides if, as we believe is appropriate, the case is now remanded.

tuitous decisions of federal questions—we have long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law." *Id.*

The Court in *Bell* was sharply divided on the question whether that practice should be followed there, because the minority believed that "the national interest imperatively calls for an authoritative decision of the question by this Court" (*id.* at 323, Black, J., dissenting; see also *id.* at 243-245, Douglas, J., dissenting on this point.) But no Justice questioned the general principle which, as the Court's opinion documented, *id.* at 237-241, was based on ample precedent, going back to *Gulf, C. & F. R. Co. v. Dennis*, 224 U.S. 503, and including such unanimous decisions as *Dorchy v. Kansas*, 264 U.S. 286 (Brandeis, J.); *Missouri ex rel. Wabash R. Co. v. Public Service Comm'n.*, 273 U.S. 126 (Stone, J.) and *Patterson v. Alabama*, 294 U.S. 600 (Hughes, C.J.).

To these and the other cases cited in *Bell*, we add one more, *Pagel v. MacLean*, 283 U.S. 266, for there, as here, the intervening circumstance was the death of one of the parties. In an opinion by Justice Stone, the Court reasoned that by virtue of that party's death, the question originally presented by the petition for certiorari "has now become subsidiary to other questions, the determination of which is necessary to the disposition of the present suit and may render unnecessary any adjudication of the rights of the [deceased] mother."

(*Id.* at 268). The case was remanded to the state court for consideration of those "other questions":

"While, in such a situation, the writ may be dismissed, see *Kimball v. Kimball*, 174 U.S. 158, the present is not a proper case for such disposition, which might leave the judgment to be enforced by the respondent administrator without determination of his rights. In order that the state court may be free to deal adequately with the questions which must be determined in order to make appropriate distribution of the fund involved, the judgment will be vacated and the cause remanded for further proceedings not inconsistent with this opinion. *Missouri ex rel. Wabash R. Co. v. Public Serv. Commission*, 273 U.S. 126, 131; *Gulf, C. & S.F. R. Co. v. Dennis*, 224 U.S. 503, 509." (*Id.* at 269).

This course should be followed here.

#### CONCLUSION

For the foregoing reasons the Motion to Vacate and Remand should be granted.

Respectfully submitted,

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